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No. 03-868

In The Supreme Court of the United States

ALLEN V. JAFFE,

Petitioner,

v.

VIRGINIA PHOTOTHERAPY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Virginia PhotoTherapy, L.L.C.[1] ("Virginia PhotoTherapy") respectfully requests that this Court dismiss the Petition for Writ of Certiorari filed by Allen V. Jaffe ("Jaffe") for failure to meet the jurisdictional requirements of this Court or, in the alternative, to exercise its discretion to deny a Writ of Certiorari for the reasons stated herein.

STATEMENT OF THE CASE

This matter arises from hair removal treatments provided by Virginia PhotoTherapy to Jaffe. Virginia PhotoTherapy employs a device known as the Epilight™ Hair Removal System which uses pulsed light to kill hair follicles at the root. The dead hair falls out and, in most cases, does not grow back. In authorizing these treatments, Jaffe signed a consent form stating: "I acknowledge that no guarantee or assurance has been given by anyone as to the results that may be obtained". Jaffe alleges that the process "did in fact only temporarily remove the hair" and has unleashed seven (7) suits, all filed *pro se*, arising from his dissatisfaction with the results of these treatments.

Jaffe's first suit against Virginia PhotoTherapy, No. CL01-1543, was filed in the Circuit Court of Henrico County on about September 13, 2001. In that suit, Jaffe alleged a variety of claims including breach of contract, breach of warranty, fraud and negligence. Virginia PhotoTherapy filed a Demurrer to Jaffe's

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[1] Pursuant to Rule 29.6, Virginia PhotoTherapy states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

pleading. While the Demurrer to Jaffe's first lawsuit was pending, Jaffe filed two (2) additional suits against Virginia PhotoTherapy in Henrico Circuit Court. The first was a Bill of Complaint, No. CH01-1438, in which he sought to enjoin Virginia PhotoTherapy from allegedly harming other customers. Virginia PhotoTherapy demurred to Jaffe's equity suit on the basis that Jaffe lacked standing to bring suit on behalf of other customers. By Order dated March 8, 2002, the Court dismissed Jaffe's equity suit for lack of standing. Jaffe also filed a second Motion for Judgment, No. CL01-2094, in which he attempted to assert a malpractice claim. Virginia PhotoTherapy filed a Special Plea to the second Motion for Judgment on the ground that it was duplicative of Jaffe's first lawsuit, No. CL01-1543, which was still pending at the time.

On April 9, 2002, the Circuit Court of Henrico County conducted a hearing on the pending demurrers and pleas in Case Nos. CL01-1543 and CL01-2094. The Court ruled that the two law actions were duplicative, and Jaffe elected to proceed on the later filed action, No. CL01-2094. Accordingly, the Court entered an Order dismissing Jaffe's original action, No. CL01-1543. The Order specifically recited that the dismissal was with prejudice as to Jaffe's claims for breach of contract, breach of warranty and fraud, and that it was without prejudice only as to the malpractice claim asserted in No. CL01-2094. The Court's April 9, 2002 Order in No. CL01-1543 is reproduced in Appendix "A". Jaffe did not note an appeal of that Order. The Henrico Circuit Court also entered an Order in No. CL01-2094, denying Virginia PhotoTherapy's Special Plea on the basis that the case was no longer duplicative after the Court's dismissal of No. CL01-1543. This Order also permitted amendment of Jaffe's Motion for Judgment in No. CL01-2094.

Virginia PhotoTherapy then filed a Demurrer and Special Plea to Jaffe's amended pleading in No. CL01-2094, on the basis that Jaffe had failed to allege that the hair removal procedure had been improperly performed by Virginia PhotoTherapy. The alleged "malpractice" consisted of advertising the process for "permanent hair removal" whereas the Food and Drug Administration ("FDA") had approved the Epilight™ device for "permanent hair reduction." Virginia PhotoTherapy demurred to this allegation on the grounds, *inter alia,* that the FDA only regulates the manufacture and sale of medical devices, not their use by physicians or others. On July 19, 2002, the Circuit Court of Henrico County heard Virginia PhotoTherapy's Demurrer and Special Plea to Jaffe's malpractice claim, No. CL01-2094. The Court agreed with Virginia PhotoTherapy's arguments and dismissed Jaffe's sole remaining claim with prejudice. That Order, dated August 8, 2002, is reproduced in Appendix "B". Jaffe did not seek to appeal this Order.

Undaunted, Jaffe decided to recast his claims in federal court, filing a Complaint in the United States District Court for the Eastern District of Virginia against Virginia PhotoTherapy, Dr. Ronald Landess (sole member and manager of Virginia PhotoTherapy), Allie Thurston (an employee of Virginia PhotoTherapy), Lumenis, Ltd. and Lumenis, Inc. (the manufacturer of the Epilight™ equipment) in Civil Action No. 3:02CV538. On September 24, 2002, the Court dismissed Jaffe's Complaint for lack of subject matter jurisdiction. This decision was not appealed by Jaffe.

Following dismissal of his federal court action, Jaffe filed a pair of additional cases in Henrico Circuit Court. His Motion for Judgment, No. CL02-1730, against Virginia PhotoTherapy was a restatement of

his prior actions previously dismissed with prejudice pursuant to the Orders described above. That pleading (less exhibits) is reproduced in Appendix "C". Jaffe also filed a separate lawsuit, No. CL02-1729, against Dr. Landess. Defendants filed Special Pleas in each of the two cases, asserting that Jaffe's claims were barred by the doctrine of *res judicata*.

A hearing was held in Henrico Circuit Court on January 24, 2003, at which the Court considered defendants' Special Pleas and Jaffe's Motions to Disqualify Circuit Judge Catherine Hammond. At the conclusion of the January 24, 2003 hearing, Judge Hammond held that No. CL02-1730 was clearly barred by *res judicata* and entered an Order dismissing that action. This Order is appended to Jaffe's Petition. Judge Hammond endorsed the Order for Jaffe (erroneously referred to as "defendant") indicating that he was present and objected to entry of the Order. She recused herself from consideration of No. CL02-1729. Accordingly, there was no ruling in that case.

On about February 7, 2003, Jaffe filed a Notice of Appeal to the Supreme Court of Virginia in No. CL02-1730 specifying that he was appealing "the final judgment Order of this Court entered on the 24th day of January, 2003." Jaffe subsequently attempted through various means to have the record amended to reflect that Judge Hammond had recused herself in No. CL02-1730 and then proceeded to grant Virginia PhotoTherapy's dispositive plea. A hearing was held on April 4, 2003, at which time Judge Hammond rejected both Jaffe's proposed Statement of Facts and declined to enter his sketch Corrected Order purporting to correct the foregoing alleged "clerical omissions" in the January 24, 2003 Order. On the same date, April

4, 2003, Judge Hammond entered an Order recusing herself from Case No. CL02-1729.

On April 29, 2003, in response to Jaffe's motions, Judge Hammond entered an amended Final Order which she drafted and signed without endorsement of Jaffe or counsel for Virginia PhotoTherapy. The amended Final Order stated that the January 24, 2003 Order "is amended to provide that plaintiff's Motion for Recusal was granted; accordingly Case No. CL02-1729 was transferred to another Judge of this Court." Notably, that Order did not amend Judge Hammond's prior determination that No. CL02-1730 was dismissed with prejudice on *res judicata* grounds, nor did it make any reference to recusal in No. CL02-1730. The amended Final Order is appended to Jaffe's Petition. No Notice of Appeal was filed following entry of this Order.

On April 28, 2003, Jaffe submitted his Petition for Appeal to the Supreme Court of Virginia in No. CL02-1730. The Assignments of Error which appear at pages 9-11 of Jaffe's Petition for Appeal are reproduced at Appendix "D". The Supreme Court of Virginia declined to grant a Writ of Appeal and dismissed Jaffe's Petition by Order dated June 25, 2003, which is appended to Jaffe's Petition. Jaffe then sought reconsideration of the Court's dismissal of his Petition, and the Supreme Court of Virginia denied Jaffe's request on September 12, 2003. This Order is also appended to Jaffe's Petition.

Case No. CL02-1729, the companion case against Dr. Landess, was reassigned to Judge Gary Hicks of Henrico Circuit Court. On September 17, 2003, Judge Hicks issued a letter opinion in which he ruled that because Dr. Landess was in privity with Virginia

PhotoTherapy, Jaffe's claims against Dr. Landess were barred by *res judicata*. Judge Hicks entered a Final Order dismissing No. CL02-1729, dated October 20, 2003. This Order is reproduced in Appendix "E." Judge Hicks subsequently entered an Order Imposing Sanctions against Jaffe for his unconscionable conduct in connection with that case. That Order is reproduced in Appendix "F." Jaffe has noted an appeal of this Order.

In addition to all of the foregoing, Jaffe has filed a seventh suit arising out of his unsuccessful hair removal treatments. This case, filed in the United States District Court for the Eastern District of Virginia, against Virginia PhotoTherapy, Dr. Landess, their counsel and Judge Hammond, alleges that defendants conspired to deprive Jaffe of his constitutional rights in connection with the above-referenced dismissals of his various suits. On January 7, 2004, United States District Judge Robert Payne dismissed the case for lack of subject matter jurisdiction. He also entered an Order to Show Cause in which he found that "the complaint filed herein is frivolous and interposed for the purpose of vexation and harassment." These Orders are reproduced in Appendices "G" and "H."

For the reasons which follow, this Court should dismiss the Petition for failure to satisfy the Court's jurisdictional requirements and/or exercise its discretion to simply decline to grant a Writ of Certiorari.

ARGUMENT

I. The Petition Fails to Meet the Court's Jurisdictional Requirements.

The jurisdictional requirements of this Court is set forth at 28 U.S.C. § 1257 which provides in pertinent part that the Court will consider:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had ... where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of ... the United States.

Rule 10 of the Rules of the Supreme Court provides that appeals are granted only for "compelling reasons" and not by right. Paragraph (c) explains that appeals may be granted where "a state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court" or "in a way that conflicts with relevant decisions of this Court." Finally, Rule 14(g) includes among the required contents of a petition a statement of the case, which is specifically required to include the stage where federal questions were raised with citations to the record to show they were timely raised.

As set forth more particularly in the preceding factual statement, this matter arises from hair removal treatments provided by Virginia PhotoTherapy to Jaffe. His Motion for Judgment (Appendix "C") purports to

state eight (8) different claims or causes of action -- First Cause of Action (Negligence); Second Cause of Action (Product Liability); Third Cause of Action (Breach of Implied Warranty); Fourth Cause of Action (Breach of Express Warranty); Fifth Cause of Action (Fraud and Deceit); Seventh Cause of Action (Negligent Misrepresentation); Eighth Cause of Action (Negligent Entrustment); and Ninth Cause of Action (Outrageous Conduct and Gross Negligence)(there is no "Sixth Cause of Action"). All of the foregoing claims and causes of action plainly arise under state law. The decision of the trial court which is being appealed was based upon the state law doctrine of *res judicata*.

Pursuant to Rule 5:17 of the Virginia Supreme Court, a Petition for Appeal must contain specific Assignments of Error setting forth particular matters being appealed. This rule specifically states: "Only errors assigned in the petition for appeal will be noticed by this Court". A review of the Assignments of Error in Jaffe's Petition for Appeal (Appendix "D") fails to reveal any question of federal law framed in Jaffe's appeal to the Virginia Supreme Court. His assignments do not even mention the 14th Amendment, which he identifies in his Petition to this Court as the "important question of federal law" which is being asserted in this appeal.

Nowhere in the Petition does Jaffe purport to satisfy Rule 14's requirement of identifying when this right was asserted below. In fact, the 14th Amendment was briefly mentioned in connection with one (1) of Jaffe's six (6) arguments. Jaffe's initial argument was that Judge Hammond, the trial judge who dismissed Nos. CL01-1543 and CL01-2094, was biased and, thus, these rulings should not have been considered in ruling on Virginia PhotoTherapy's Special Plea in the subject action. No factual or legal support is offered for this

assertion, other than pointing to her subsequent voluntary recusal in No. CL02-1729. In this regard, at pages 23-4 of the Petition for Appeal, Jaffe states: "she also cosidered [sic] the fact that the plaintiff, petitioner's rights under the due process clause of the 14th Amendment to the Contitution [sic] of these United States, were severely abridged in the previous actions." A similar reference appears at page 25, where Jaffe states: "to allow them [the decisions in CL01-1543 and CL01-2094] to be a bar under *res judicata* would strike a blow against equity in law and the plaintiff's rights under the 14th Ammendment [sic]." See also paragraph 7 of Jaffe's Statement of the Case, page 14, where he asserts that in connection with these prior actions, Nos. CL01-1543 and CL01-2094, "plaintiff was deprived of his civil right to justice and equity under the 14th Amendment." These three references are the only citations to the 14th Amendment in the Petition for Appeal.

The foregoing clearly fails to satisfy this Court's jurisdictional requirements that a right protected under federal law be "specifically set up" and "timely raised." Importantly, in connection with this argument, Jaffe was not asserting any deprivation of constitutional rights in connection with the adjudication of the subject case. Rather, he is arguing that his rights were infringed when prior actions, Nos. CL01-1543 and CL01-2094, were dismissed. Under Virginia procedure, Jaffe had a right to appeal these decisions to the Virginia Supreme Court. However, pursuant to Rule 5:9 of the Rules of the Virginia Supreme Court, a Notice of Appeal must have been filed within thirty (30) days of entry of the Final Order in these cases. His appeal was rejected not under any interpretation of the 14th Amendment by the Virginia Supreme Court which should now be reviewed by this

Court, but simply due to Jaffe's failure to exercise his right of appeal to these decisions as provided by Virginia law.

Moreover, to the extent this Court regards this argument as having presented a federal question to the Virginia Supreme Court, it does not appear to correlate to any of the issues appealed by Jaffe in his Petition to this Court. Accordingly, the Petition should be denied or dismissed for the simple reason that it fails to meet this Court's jurisdictional requirements.

II. The Issues Presented to the Virginia Supreme Court Were Fully and Fairly Adjudicated under State Law.

To the extent this Court wishes to consider the 14th Amendment to have been timely raised below, the Petition fails to make any connection between the 14th Amendment and the alleged errors being appealed. Rather, it is apparent that each of the issues presented to the Virginia Supreme Court was fully and fairly adjudicated under state law.

The gravamen of Jaffe's first three arguments is that the trial judge erred in sustaining a plea of *res judicata* without formally admitting into evidence the entire record of each of the prior proceedings being relied upon. No constitutional basis is asserted in support of these arguments. Rather, the authority cited consists of decisions under state law governing various aspects of a *res judicata* plea. Significantly, there is also compelling authority that a Court may take judicial notice of its own rulings, particularly in prior actions between the same parties. *See, e.g.*, Virginia Code § 8.01-387 ("All courts and officers shall take notice of the signature of any of the judges, or of

the Governor of this Commonwealth, to any judicial or official document"); Wigmore on Evidence § 2579 (noting that judicial notice often taken by trial courts of "the record in the same proceeding or in a prior stage of the same controversy..."); *Haynes v. Glenn*, 197 Va. 746, 752, 91 S.E.2d 433, 437 (1956); *Gauss v. Commonwealth*, 141 Va. 440, 443, 126 S.E. 1, 2 (1925)("That an appellate court will take judicial notice of its own records appears to be well settled").

Jaffe had filed at that point four (4) prior actions, all of which had been dismissed and none of which had been appealed by Jaffe. Two of these decisions, No. CL01-1543 and No. CL01-2094, were on the merits and with prejudice. See Appendices "A" and "B". Both of these decisions were rendered by the same Court and, in fact, by the same trial judge, as rendered the decision being appealed. Notwithstanding this, the judge had before her the files in both of these actions and consulted the files in ruling upon Virginia PhotoTherapy's plea. At no point below did Jaffe object to the failure to admit these files into evidence when such omission could easily have been cured. Similar to Rule 14 of this Court, Rule 5:25 of the Virginia Supreme Court requires as a condition of appealing a ruling that a timely objection be raised so that the trial judge may make an informed ruling. As indicated in the Virginia Supreme Court's Order denying his appeal, this issue was rejected due to Jaffe's own failure to make a timely objection and to preserve a record of same for consideration on appeal.

Similarly, Jaffe's fourth argument asserts that the dismissal of No. CL02-2094 should not bar subsequent assertion of related claims because that decision was rendered under the Virginia Medical Malpractice Act, Virginia Code § 8.01-58.1 *et seq.* Jaffe

ignores the previous dismissal of No. CL01-1543 which was expressly with prejudice to any claim for breach of contract, breach of warranty or for fraud. Thus, all or most of the claims asserted in this action were barred without regard to the Order dismissing No. CL01-2094. The only claim reserved for further adjudication was the malpractice claim asserted in No. CL01-2094, which was also pending at the time. See Appendix "A". Jaffe did not appeal the Final Order in No. CL01-1543. Thus, once the Court had dismissed No. CL01-2094, the only claim reserved in the previous dismissal order, all claims and causes of action were extinguished. See Appendix "B". Importantly, Jaffe failed to appeal the Final Order in No. CL01-2094 as well.

Jaffe's argument also misinterprets the Virginia Medical Malpractice Act. It does not create any new cause of action. Rather, it sets forth a procedural framework for assertion of common law causes of action such as battery or negligence against "health care providers" as defined in the Act. The Demurrer filed by Virginia PhotoTherapy to No. CL01-2094 did include among its bases that hair removal was not a "medical" procedure. Assuming that the Court agreed, however, this argument would not have resulted in dismissal of the action. The dismissal of the action was due to the more fundamental flaw in Jaffe's Motion for Judgment -- the failure to make any effective allegation of negligence or other breach of duty under state law.

The fifth argument centers around the alleged recusal of the trial judge in No. CL02-1730. Here Jaffe has simply misrepresented the facts. A hearing was held jointly in No. CL01-1729, in which Jaffe asserted substantially the same claims against Dr. Landess, and No. CL02-1730 against Virginia PhotoTherapy for consideration of Special Pleas by defendants asserting

res judicata and Motions to Disqualify filed by Jaffe. At that time, the trial judge granted Jaffe's Motion to Disqualify as to No. CL02-1729. An Order correctly reflecting this ruling was entered by the Court on April 4, 2003. As to No. CL02-1730, however, the trial judge ruled that there was no credible argument that the case was not barred by *res judicata*, declined to recuse herself, and granted defendant's Special Plea. This is accurately reflected in an Order presented and entered in Jaffe's presence at the hearing on January 24, 2003.

Jaffe has continued to maintain that the trial judge had recused herself in both cases and then proceeded to rule on the Special Plea in No. CL02-1730. After noting an appeal to the January 24, 2003 Order, he proceeded via various means to attempt to have the record amended to reflect same. The trial judge disagreed, and rejected both this proposed Statement of Facts and his Motion to Correct Clerical Omission in Previous Order. In fact, the trial judge entered an amended Final Order which she prepared on April 29, 2003. This Order recites recusal in No. CL02-1729 only.

It is well established in Virginia that Courts speak through their Orders and that preliminary statements made during the course of argument or otherwise by the Judge are not rulings of the Court unless and until incorporated into a written Order. *See, e.g., Wagner v. Shird*, 257 Va. 584, 514 S.E.2d 613 (1999); *Berean Law Group, PLC v. Cox*, 259 Va. 622, 528 S.E.2d 108 (2000). Thus, Jaffe's fundamental assertion that the January 24, 2003 Order was "fraudulent" because it did not accurately reflect Judge Hammond's rulings is legally impossible. As a matter of law, unless and until modified, vacated or

suspended, the January 24, 2003 Order entered by Judge Hammond was her ruling in the case.

Jaffe's assertion that Judge Hammond recused herself in No. CL02-1730 and then proceeded to sustain Virginia PhotoTherapy's Special Plea is itself a legal *non sequitur*. Jaffe does not question that Judge Hammond sustained the Special Plea in No. CL02-1730 and dismissed this case. By proceeding to rule on the Special Plea in No. CL02-1730, by definition, the Judge was declining to disqualify herself from consideration of the case. Moreover, had Judge Hammond intended to disqualify herself in both cases as contended by Jaffe, she would have entered Jaffe's sketch Corrected Order reciting recusal in No. CL02-1730 when this omission was called to her attention in Jaffe's Motion to Correct Clerical Omission in Previous Order. The only conclusion that can reasonably be drawn is that Judge Hammond intended to sustain the Special Plea as to No. CL02-1730 and to recuse herself from No. CL02-1729, precisely as reflected in her January 24, 2003 and April 4, 2003 Orders.

Judge Hammond's amended Final Order recites as grounds for amendment that the original Order did not provide for the Clerk to send Jaffe a copy and that he did not get a copy within twenty-one days of entry. Neither counsel nor the Court are required to provide litigants with copies of entered Orders. Rather, Rule 1:13 of the Rules of the Virginia Supreme Court provides that sketch Orders be endorsed, presented at a duly noticed hearing or that compliance with the rule be modified or dispensed with by the Court. Under the circumstances of this case where the Order was being entered in open Court, at a duly noticed hearing and in Jaffe's presence, the Judge was clearly acting within her discretion to endorse the Order on Jaffe's behalf,

noting his appearance and objection to her ruling. *Smith v. Stanaway*, 242 Va. 286, 410 S.E.2d 610 (1991); *Davis v. Mullins*, 251 Va. 141, 466 S.E.2d 90 (1996); *Napert v. Napert*, 261 Va. 45, 540 S.E.2d 882 (2001). Once an Order is entered, it is the duty of counsel (or *pro se* party) desiring to appeal to obtain a copy from the Clerk's Office.

Jaffe did not present below and does not present in his Petition, any grounds for disqualification of Judge Hammond. Rather, it is evident that after having suffered dismissal of three (3) previous actions by Judge Hammond, he was simply seeking to try his luck with another judge. As discussed in more detail in Section IV below, however, even this would fail to save his hopelessly flawed claims.

III. Petitioner is Raising Claims Not Litigated Below.

Jaffe's sixth and seventh arguments relate to the trial court's refusal to enter his Statement of Facts and to the fact that the amended Final Order was not entered "*nunc pro tunc*". As explained above, the trial judge found Jaffe's proposed statement inaccurate and refused to enter it. The trial judge similarly rejected the sketch Corrected Order proposed by Jaffe amending the January 24, 2003 Order by reciting that the trial judge had recused herself and then proceeded to grant a dispositive motion. Instead, the trial judge entered an amended Final Order on April 29, 2003, reciting recusal in No. CL02-1729 only and leaving in place her previous dismissal of the action pursuant to Virginia PhotoTherapy's plea of *res judicata*.

Jaffe's appeal to the Virginia Supreme Court was heard pursuant to a Notice of Appeal filed on or about

February 7, 2003 and specifying that the Order being appealed was the January 24, 2003 Order. This Order (and Jaffe's Notice of Appeal) preceded both Jaffe's filing of his proposed Statement of Facts (March 19, 2003) and his Motion to Correct Clerical Omission in Previous Order (March 17, 2003). No Notice of Appeal was filed to the amended Final Order entered on April 29, 2003. Thus, Jaffe has failed to meet even the most basic requirement of appealing the trial court's ruling on these issues.

In fact, Virginia PhotoTherapy filed a Motion to Dismiss on the basis that Jaffe had failed to file a Notice of Appeal to the April 29, 2003 amended Final Order. The Virginia Supreme Court ruled *sua sponte* that the April 29, 2003 Final Order had been entered after expiration of the time permitted by Rule 1:1 of the Rules of the Virginia Supreme Court. Thus, the trial court had lost jurisdiction of the case and the Order was a nullity. (This would have been the case even if the trial judge had entered the Order *nunc pro tunc*). Importantly, had the Virginia Supreme Court ruled otherwise, Jaffe's appeal would have been summarily dismissed for failure to file a timely Notice of Appeal.

Finally, as discussed above, Rule 5:17 of the Virginia Supreme Court requires that any alleged error being appealed be separately identified in Assignments of Error. A review of the Assignments of Error in Jaffe's Petition for Appeal (Appendix "D") will confirm that neither issue was presented to the Virginia Supreme Court.

IV. Petitioner's Rights Have Not Been Prejudiced in Any Way.

At the January 24, 2003 hearing at which Special Pleas were considered by the trial court in No. CL02-1729 and No. CL02-1730, the trial judge granted Jaffe's Motion to Disqualify as to No. CL02-1729. This case was substantially identical to the subject action with the exception that the defendant was Dr. Landess, whereas the defendant in all of the previous actions was Virginia PhotoTherapy. Contrary to federal law and the law of many states, Virginia has long observed a rule requiring mutuality of parties as a condition of asserting collateral estoppel or *res judicata*. However, this rule is tempered by a doctrine permitting the assertion of these pleas by a party who is in privity with a party to the previous action. Accordingly, Dr. Landess asserted his Special Plea as the sole member and manager of Virginia PhotoTherapy. Importantly, the party against whom the plea was asserted -- Jaffe -- was absolutely identical in all actions. Thus, there is no issue as to whether Jaffe was afforded a full and fair opportunity to be heard in the prior actions.

No. CL02-1729 was referred to another judge of the Henrico Circuit Court and Dr. Landess' Special Plea was brought on for hearing on August 22, 2003. In connection with this case, the entire file of all of Jaffe's previous actions was introduced into evidence over Jaffe's objection. Judge Hicks issued his decision by letter dated September 17, 2003, in which he sustained Dr. Landess' plea of *res judicata*. A Final Order (Appendix "E") was entered on October 20, 2003 dismissing the case with prejudice. The plea in this case presented every issue which would have been pertinent to consideration of Virginia PhotoTherapy's plea in No. CL02-1730 plus the additional factor of the

lack of strict mutuality of parties and the necessity of establishing privity. It would be literally impossible for Judge Hicks to have sustained Dr. Landess' plea in No. CL02-1729 and not to have likewise sustained Virginia PhotoTherapy's plea in No. CL02-1730. Thus, notwithstanding all of the arguments presented by Jaffe, the simple fact is that his rights were not prejudiced in any way.

CONCLUSION

This Court should dismiss the appeal as failing to meet the jurisdictional requirements of 28 U.S.C. § 1257 and Rules 10 and 14 of this Court. The Motion for Judgment which initiated this action asserts purely state law claims. On appeal to the Virginia Supreme Court, Jaffe failed to properly frame in his Assignments of Error any constitutional issue. The only citations in his Petition for Appeal to the Virginia Supreme Court to any federal constitutional or statutory right are in support of his first assignment of error in which he asserted that prior adjudications, which he failed to appeal as provided by the Rules of the Virginia Supreme Court, were tainted by bias on the part of the trial judge and should not have been considered in support of Virginia PhotoTherapy's plea of *res judicata*. It is apparent that the Virginia Supreme Court rejected Jaffe's appeal, not under any interpretation of the 14th Amendment, but due to his failure to appeal these prior decisions.

Even if this Court were to disregard the foregoing infirmities in Jaffe's appeal, an analysis of the arguments presented in this Petition confirms that each issue which was argued to the Virginia Supreme Court was correctly decided under state law. The evidentiary requirements for sustaining a plea of *res*

judicata are a matter of state law. The decisions of the Virginia Supreme Court on this subject are conflicting, with some decisions indicating that the entire record in the prior action(s) must be introduced into evidence, and other decisions confirming that a Court may take judicial notice of its own Orders in prior actions, particularly related actions among the parties to the pending action. In any event, there is no constitutional issue presented. Likewise, Jaffe fails to present any constitutional issue as to the Virginia Supreme Court's application of the Virginia Medical Malpractice Act. His arguments related to the alleged recusal of the trial judge are unsupported by the record.

Jaffe's arguments related to the trial judge's refusal to enter his Statement of Facts and entry of the April 29, 2003 amended Final Order were not argued below and are not properly before this Court. The appeal to the Virginia Supreme Court was argued pursuant to a Notice of Appeal filed on or about February 7, 2003 and which specifies that the Order being appealed was the January 24, 2003 Order sustaining Virginia PhotoTherapy's Special Plea. No appeal was noted following entry of the trial court's amended Final Order on April 29, 2003 and Jaffe's Petition for Appeal to the Virginia Supreme Court fails to argue either issue.

Finally, it is apparent from a review of the record that Jaffe's rights have not been prejudiced in any way. Judge Hammond, the trial judge Jaffe falsely accuses of bias, recused herself from consideration of a companion action filed the same day as the subject action. This case presented all issues present here and, in addition, required establishing privity between Virginia PhotoTherapy and Dr. Landess. Another circuit judge, as to whom Jaffe has made no such

allegation, has ruled Jaffe's claims barred by *res judicata* and, in fact, sanctioned Jaffe for frivolous and abusive litigation conduct. For all of the foregoing reasons, this Court should dismiss this appeal and/or exercise its discretion to simply deny a Writ of Certiorari.

Respectfully submitted,

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